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No. 22,395

United States Court of Appeals

For the Ninth Circuit

SHAFFER C. TIM,
Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,
Appellee.

APPELLANT'S PETITION FOR REHEARING and PETITION FOR HEARING EN BANC

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To the Honorable Frederick G. Hamley, Oliver D. Hamlin, and M. Oliver Koelsch, Circuit Judges, United States Court of Appeals for the Ninth Court:

SUGGESTION FOR REHEARING EN BANC PURSUANT TO F. R. C. P. 35(a)(2)

Appellant respectfully suggests this Court rehear en banc the issue presented by this appeal for the reason that the proceeding involves a question of exceptional importance.

I.

INTRODUCTION

On March 18, 1969, the United States Court of Appeals for the Ninth Circuit, Circuit Judges Hamley, Hamlin and Koelsch presiding, rendered its opinion holding: the negligence of the stevedore, while acting within the course and scope of his employment on board defendant American President Lines vessel, afloat in navigable waters, which proximately caused injury to Appellant seaman, while acting within the course and scope of his employment as defendant's chief electrician on board said vessel, did not constitute negligence on the part of defendant, American President Lines, nor did such negligence constitute an unseaworthy condition.

The significance of this Petition for Rehearing En Banc is that the Ninth Circuit is the only Court in this land which has so interpreted *Mascuilli v. United States,* 387 U.S. 237, 358 F. 2d 133. The conclusion by this Ninth Circuit Court of Appeals is

directly contrary to opinions rendered by the United States Supreme Court, Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the Canal Zone, the United States District Court for the Western District of Louisiana, the United States District Court for the Eastern District of Louisiana and the Supreme Court of the State of New York.

II.

OPERATIONAL NEGLIGENCE OR INSTANTANEOUS UNSEAWORTHINESS ARE NO LONGER RELEVANT ISSUES WITH REGARD TO THE DOCTRINE OF SEAWORTHINESS

The United States Supreme Court in *Mascuilli v. United States,* 387 U.S. 237, 1967 AMC 1702, 358 F. 2d 133, succinctly held that concepts of operational negligence and/or instantaneous unseaworthiness are no longer relevant issues in determining question of liability under the Doctrine of Seaworthiness.

The United States Supreme Court reiterated this conclusion by denying certiorari in the case of *Moore-McCormack Lines v. Candiono,* 390 U.S. 1027, 88 S. Ct. 1416.

The United States Supreme Court further reiterated its holding in *Mascuilli v. United States* by denying certiorari in the case of *Skibinski v. Waterman,* 387 U.S. 921; 87 S. Ct. 2027.

The interpretation given by this Ninth Circuit Court of Appeals to the decision in *Mascuilli v. United States, supra,* is directly contrary to the in-

terpretation given to that same decision by every Court which has passed upon or considered that same decision. This Ninth Circuit Court of Appeals recognizes in its opinion, that no other Court in this land has so interpreted the decision of *Mascuilli v. United States, supra.* (See opinion filed March 18, 1969, p. 6, footnote 4 wherein this Ninth Circuit Court of Appeals sets forth five District Court decisions all of which interpreted *Mascuilli v. United States* contrary to this Ninth Circuit Court of Appeals.)

For cases contrary to this Ninth Circuit Court of Appeals holding in this matter see: *Mascuilli v. United States,* 387 U.S. 237, 1967 AMC 1702; *Moore-McCormack Lines v. Candiono,* 390 U.S. 1027, 88 S. Ct. 1416; *Skibinski v. Waterman,* 387 U.S. 912, 87 S. Ct. 2027; *Candiono v. Moore-McCormack Lines,* 382 F. 2d 961; *Venable v. A-S Det Furenede Dampskibssels-Kab,* 399 F. 2d 347; *Skibinski v. Waterman,* 360 F. 2d 539; *Alexander v. Bethlehem Steel,* 382 F. 2d 963; *U.S. v. Bookbinder* (United States District Court E.D. Pennsylvania), 291 F. Supp. 84, 87; *Buljanovic v. Grace Line* (S. Ct. in the State of New York), 1968 MC 1483, 1484; *Sandoval v. Mitsui Sempaqu K.K. Tokyo,* 288 F. Supp. 377, 382 (D. Canal Zone, 1968); *Hanks v. California Company,* 280 F. Supp. 730, 739 (W.D. La. 1967); *Jackson v. SS. Kings Point,* 276 F. Supp. 451, 452 (E.D. La. 1967); *Wilson v. Societa Italiana de Armamento,* 279 F. Supp. 945, 948 (E.D. La. 1968).

In addition, this Ninth Circuit Court of Appeals based its interpretation of *Mascuilli v. U.S., supra,* on excerpts taken from a Petition for Certiorari filed

with the United States Supreme Court. The excerpts referred to by this Ninth Circuit Court of Appeals appear nowhere in this record on Appeal nor in any briefs submitted by either Appellants or Appellees. Appellant is not able to argue this Ninth Circuit Court of Appeals' conclusions relative to the material excerpted from the briefs in certiorari. Appellant is not in possession of the briefs filed in the *Mascuilli* decision.

Furthermore, this Ninth Circuit Court of Appeals decision runs directly contrary to what in fact transpired when the United States Supreme Court in *Mascuilli v. U.S.* denied certiorari with regard to the Court of Appeals' decision in *Mascuilli* (358 F. 2d 133).

In *Mascuilli v. U.S.* (387 U.S. 237) the United States Supreme Court sets forth the facts relied upon by the United States Supreme Court as those appearing in *Mascuilli v. U.S.,* 358 F. 2d 133.

In *Mascuilli v. U.S.,* 358 F. 2d 133, the only facts and/or conclusions set forth in that opinion are as follows: ". . . the findings of fact by the trial court that the vessel and its equipment were in a seaworthy condition at all times throughout the loading operations and that the accident was caused solely by the negligent operation of the stevedoring crew as stated in finding of fact number 35, are not clearly erroneous".

Finding number 35 provided: "in summary, the court finds that the vessel and all of its equipment was in a seaworthy condition at all times and remained so throughout the entire loading operations.

The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the third officer was unable to warn anyone or prevent its happening". (See, *Mascuilli v. United States,* 241 F. Supp. 354, 362.)

It is submitted that any possible, logical, conclusion to be derived from the Court's opinion in *Mascuilli v. U.S.,* 387 U.S. 237, is that the United States Supreme Court expressly reversed the United States District Court finding number 35 and held that a condition of unseaworthiness existed in those circumstances where a vessel and all of its equipment were in a seaworthy condition, at all times, and that the accident in question was solely caused by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause "the accident to occur so instantaneously that the third officer was unable to warn anyone or prevent its happening".

To re-emphasize this explicit holding, the United States Supreme Court denied certiorari in *Moore-McCormack Line v. Candiono,* 390 U.S. 1027, 88 S. Ct. 1416. In *Candiono v. Moore-McCormack Lines,* 382 F. 2d 961, there was but one issue presented on that appeal. The issue presented and decided was "the doctrine of operational negligence is not a factor in determining liability of a ship owner to a longshoreman for injuries aboard ship during loading and unloading operations". It is submitted that if confusion or misinterpretation existed relative to the United States Supreme Court's conclusion in *Mascuilli v.*

United States, that alleged confusion was eliminated by that same Court's denying certiorari in the case of *Moore-McCormack Lines v. Candiono, supra.*

It is submitted that the test for determining seaworthiness has clearly been set forth as follows:

> Was the equipment, whether defective or not, unsafe and therefore unfit because of the manner in which it was actually used. (See, *Candiono v. Moore-McCormack Lines,* 251 F. Supp. 654, 656; *Mahnich v. Southern SS. Company,* 321 U.S. 96, 104, 64 S. Ct. 455, 459; *Waldron v. Moore-McCormack Lines,* 386 U.S. 724, 726, 87 S. Ct. 1410, 1412).

In conclusion, it is submitted that the United States Supreme Court resolved the issue presented here on Appeal in favor of Appellant in *Waldron v. Moore-McCormack Lines,* 386 U.S. 724; *Mascuilli v. United States,* 387 U.S. 237; *Moore-McCormack Lines v. Candiono,* 390 U.S. 1027, 88 S. Ct. 1416.

In *Waldron v. Moore-McCormack Lines* the Court stated: "The basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness, for drawing a distinction between the ship's equipment on the one hand, and its personnel on the other". (See, *Waldron, supra,* 386 U.S. 724, 726, 87 S. Ct. 1410, 1411.) The Supreme Court held there was no such distinction; concluding that a negligent acting crew member is synonymous with defective equipment, as regards the doctrine of seaworthiness.

In *Mascuilli v. U.S.,* the United States Supreme Court held this same conclusion results when the neg-

ligent party is a longshoreman as opposed to a crew member.

In *Moore-McCormack Lines v. Candiono,* 390 U.S. 1027, the Supreme Court of the United States merely reiterated its previously held conclusion: that the negligence of a crew member or longshoreman, while acting within the course and scope of his employment, proximately injuring a fellow crew member, creates liability as to the vessel in question because such negligent act constitutes an unseaworthy condition, at the time and in the manner said act was performed.

III.

THE CONCEPT OF AGENCY UNDER THE F.E.L.A. AND THE JONES ACT IS NOT SYNONYMOUS WITH DEGREE OF CONTROL AS WAS THE CASE AT COMMON LAW

This Ninth Circuit Court of Appeals held that the concept of "agency" as used in the F.E.L.A. and the Jones Act is synonymous with the term "agency" as used in common law.

The United States Supreme Court held in *Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423, 427; 79 S. Ct. 445, 447.

> "The work of loading and unloading is historically 'the work of the ship's service'. *Seas Shipping Company v. Sieracki, supra,* 328 U.S. at p. 96, 66 S. Ct. at p. 878.
>
> This protection against unseaworthiness imposes a duty which the owner of the vessel cannot delegate. (*Seas Shipping Company v. Sieracki, supra,*

328 U.S. at p. 100, 66 S. Ct. at p. 880.) Unseaworthiness extends not only to the vessel but to the crew (*Boudoin v. Lykes Brothers Steamship Company,* 348 U.S. 336, 75 S. Ct. 382, 99 Lawyers Edition 354) and to appliances that are appurtenant to the ship. *Mahnich v. Southern SS. Company,* 321 U.S. 96, 64 S. Ct. 455, 88 Lawyers Edition 561. And as to appliances, the duty of the shipowner does not end with supplying them; he must keep them in order. Id, 321 U.S. at p. 104, 64 S. Ct. at p. 459; The Osceola, 189 U.S. 158, 175, 23 S. Ct. 483, 487, 47 Lawyers Edition 760. The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company."

Because the duty of the shipowner is non-delegable and continuous and does not end by transferring this historical unloading duty to stevedores, the same United States Supreme Court in *Hobson v. Texaco Incorporated,* 383 U.S. 262, 86 S. Ct. 765, held that the duty of the ship as to rendering medical attention to injured crew members also cannot be delegated to a taxicab driver and thus avoid the non-delegable duty.

Supreme Court of the United States in *Hobson v. Texaco, supra,* specifically held that the Federal Employers Liability Act "is a radical departure from the rules of common law" with regard to the interpretation to be made of the term "agency". (*Hobson v. Texaco, supra* at 86 S. Ct. 766.)

The Ninth Circuit Court of Appeals concluded that the stevedore, while unloading defendant's vessel, was

not the "agent" of defendant American President Lines because American President Lines did not select the stevedoring company, nor contract with the stevedoring company, nor had an ownership interest in said stevedoring company.

It is submitted the test for agency is not one of selection, contract or financial interest. As set forth above, the question of agency turns on the fact that the shipowner has a non-delegable duty which cannot be avoided by relinquishing its historical obligation to unload and discharge cargo to a stevedoring company.

The District Court, trial Court, specifically held that the contracts entered into between defendant American President Lines, the United States Government and Matson Terminals "were not regarded by the trial judges as having significance insofar as the judgment reached was concerned". (See finding of fact number 3.)

Furthermore, this Ninth Circuit Court of Appeals fails to recognize that contracts were in fact entered into between American President Lines and the United States Government wherein it was contractually required that a stevedoring company be provided for the purpose of discharging cargo from American President Lines vessel. Thus Matson Terminals *was* contractually performing stevedoring acts on board defendant's vessel pursuant to and as a result of a contract entered into between American President Lines and the United States Government. Had American President Lines not so contracted, the neg-

ligent stevedore in question would not have been aboard at the time of the accident in question and would not have been operating the Gantry Crane in a negligent manner as found by the District Court.

This Ninth Circuit Court of Appeals fails to recognize that the negligent stevedore was assisting in performing the contractual obligation of American President Lines to discharge the cargo from the vessel in question.

The Court's opinion therefore is contrary to the law, the findings and the evidence.

JARVIS, MILLER & STENDER,
R. JAY ENGEL,
Attorneys for Appellant and Petitioner.

CERTIFICATION OF COUNSEL

I, R. Jay Engel, counsel for the petitioner certify that the foregoing petition for rehearing is well founded for the reasons set forth above. I further certify that this petition for rehearing is not interposed for delay.

R. JAY ENGEL,
Attorney for Appellant and Petitioner.